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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Rey David Aguirre,

No. CV-15-00258-TUC-RM

10 Petitioner,

ORDER

11 v.

12 Charles L Ryan, et al.,

13 Respondents.

14
15 Pending before the Court is Petitioner Rey David Aguirre's Petition under 28
16 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1). Respondents filed a Limited
17 Answer to the Petition (Doc. 15) and Petitioner filed a Response to the Limited Answer
18 (Doc. 16). The Court will deny the Petition and dismiss this action with prejudice.

19 **I. Background**

20 Petitioner was convicted in the Pima County Superior Court following a 2013 jury
21 trial of one count of conspiracy, one count of illegally conducting an enterprise, one
22 count of transporting more than two pounds of marijuana for sale, two counts of
23 transporting less than two pounds of marijuana for sale, two counts of money laundering,
24 and thirty-three counts of use of a wire or electronic communication in drug-related
25 transactions. (Doc. 1 at 1-2¹; Doc. 15 at 2; Doc. 15-1 at 25-33, 36-56; Doc. 16 at 5-6.²)

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27 ¹ All record citations refer to the page numbers generated by the Court's electronic
28 filing system.

2 ² The Petition (Doc. 1 at 2) mistakenly listed 35 counts of use of a wire or
electronic communication in drug-related transactions; Petitioner filed a notice of errata

1 Petitioner was sentenced on these counts to consecutive and concurrent terms totaling
2 10.5 years in state custody followed by 7 years of probation. (Doc. 1 at 2; Doc. 15-1 at
3 36-57, 68; Doc. 15-2 at 5; Doc. 15-5 at 28.)

4 Petitioner's appellate counsel filed a brief with the Arizona Court of Appeals in
5 compliance with *Anders v. California*, 386 U.S. 738 (1967), averring that, having
6 reviewed the record, he found no arguable question of law. (See Doc. 15-1 at 84.)
7 Petitioner was granted additional time to file a supplemental brief pro se, but he never
8 filed one. (Doc. 15-2 at 2, 5.) In a memorandum decision affirming Petitioner's
9 convictions and sentences, the Arizona Court of Appeals stated that it reviewed the
10 record and "found no reversible error and no arguable issue warranting further appellate
11 review." (*Id.* at 6.) Petitioner did not file a motion for reconsideration or petition for
12 review of the Court of Appeals' memorandum decision. (Doc. 15-2 at 8.)

13 Petitioner subsequently filed a Rule 32 Petition for Post-Conviction Relief alleging
14 only ineffective assistance of his trial counsel. (See Doc. 15-3 at 2-21.) The Rule 32
15 Petition alleged that trial counsel was ineffective when he (1) filed a motion to withdraw
16 about 20 days before trial, cited no basis for the motion, and permitted the hearing on the
17 motion to be held off the record (*id.* at 10); (2) entered into prejudicial stipulations on
18 behalf of Defendant with no record of Defendant's consent to enter into such stipulations
19 (*id.* at 13); and (3) entered into stipulations detrimental to the Defendant without any
20 apparent benefit (*id.* at 15). The Pima County Superior Court determined, without
21 holding an evidentiary hearing, that Petitioner had "failed to state a colorable claim for
22 post-conviction relief." (Doc. 15-5 at 6.) The Arizona Court of Appeals granted review
23 but denied relief, finding that Petitioner had failed to establish deficient performance and
24 prejudice. (*Id.* at 28-31.) Petitioner failed to timely file a motion for reconsideration or a
25 petition for review of the Court of Appeals' decision. (See *id.* at 33.)

26 **II. The Petition**

27 In his § 2254 Petition, Petitioner raises four grounds for relief: (1) Petitioner was
28 _____
in his Response to the Limited Answer (Doc. 16 at 5-6).

1 indicted under false pretenses; (2) the state’s witness gave hearsay testimony at
2 Petitioner’s trial; (3) prosecutorial misconduct; and (4) the presiding judge at Petitioner’s
3 trial lacked jurisdiction. (Doc. 1 at 6-9.) Petitioner indicates that he did not present any of
4 these grounds to the Arizona Court of Appeals, with the explanation that only ineffective
5 assistance of counsel was raised. (*Id.*) In the section of the Petition entitled “Timeliness
6 of Petition” Petitioner provides a prayer for relief; he does not address the timeliness of
7 his Petition. (*Id.* at 11.)

8 In support of Ground One, Petitioner alleges that the evidence presented to the
9 grand jury was “taken from another file” as to one count of his indictment. (*Id.* at 6.) As
10 to another count, Petitioner claims that no evidence was presented to the grand jury to
11 support an indictment. (*Id.*) Additionally, Petitioner calls into question the factual
12 foundation of various counts of his indictment based on when certain information was
13 made part of Petitioner’s file relative to when his indictment issued. (*Id.*) In essence,
14 Petitioner seems to be claiming that his indictment was issued without the requisite level
15 of proof. Exhibits One through Four (*id.* at 12-19) to the Petition are records and record
16 requests that purportedly support Petitioner’s claim that there was insufficient evidence
17 presented or available to be presented to the grand jury at the time of his indictment.

18 Ground Two alleges violations of “federal and state rules of ‘hearsay’” by a state’s
19 witness when, in anticipation of sworn testimony at trial, that witness “very frequently
20 read [] text messages and listened to [] phone recordings.” (*Id.* at 7.) Additionally,
21 Petitioner claims that the “state witness violated his oath of office when presenting
22 ‘hearsay’ testimony. . . .” (*Id.*)

23 In support of the prosecutorial misconduct allegation raised in Ground Three,
24 Petitioner states that the “prosecutor engaged in conduct she knew to be dishonest,
25 fraudulent, and deceitful” and that the “improper conduct permeated the entire
26 atmosphere of the trial.” (*Id.* at 8.) Specifically, Petitioner claims that the prosecutor
27 wrongly “vouched for the credibility of State and Federal witnesses.” (*Id.*) Petitioner
28 claims that, as a result, his Sixth and Fourteenth Amendment rights were violated. In

1 support of this claim, he attaches a transcript, presumably of testimony given in relation
2 to his criminal trial. (*Id.* at 22-23.)

3 In Ground Four, Petitioner alleges that the Pima County Superior Court judge
4 lacked “jurisdiction” to preside over his case because “he had not taken a timely oath of
5 office” in violation of Article 6, Section 3 of the United States Constitution and A.R.S. §§
6 38-231, 38-232, 38-361, and 38-291(a). (*Id.* at 9.) Petitioner states that “[t]he Judge in
7 [Petitioner’s criminal case] did usurp into the office he occupied unlawfully.” (*Id.*)
8 Exhibit Six is a list of the filing dates of oaths of office for some Pima County Superior
9 Court judges. (*Id.* at 24.) The Honorable Christopher Browning presided over Petitioner’s
10 trial (see Doc. 15-1 at 20), and according to Exhibit 6, his oath of office was filed on
11 September 22, 1998. (Doc. 1 at 24.)

12 Respondents filed a Limited Answer to the petition addressing only affirmative
13 defenses. (Doc. 15.) Respondents argue that all four grounds of the petition are
14 “procedurally defaulted because [Petitioner] failed to properly exhaust them in the
15 Arizona Court of Appeals.” (*Id.* at 4; *see also id.* at 8-11.) Respondents argue that a return
16 to state court to attempt to exhaust the claims would be futile in light of state procedural
17 rules, and that Petitioner has failed to show cause and prejudice or actual innocence to
18 excuse his failure to exhaust. (*Id.* at 8-11.) Respondents also argue that two of
19 Petitioner’s claims are not cognizable in federal habeas proceedings. (*Id.* at 8-10.)

20 Petitioner filed a Response to the Limited Answer. (Doc. 16.) As to each ground,
21 Petitioner re-alleges the factual and legal bases for his claims. (*Id.* at 2-5.) Petitioner also
22 argues that he has exhausted his claims based on a filing with, and subsequent order
23 issued by, the Arizona Supreme Court. (*Id.* at 2.) Petitioner attached as exhibits to his
24 Response the referenced filing and order. (See Doc. 16-1, 16-2.) The filing, which is
25 titled “Motion to Request Investigation into Prosecutor Misconduct[,]” lists the Arizona
26 Supreme Court as a Defendant, and appears to be addressed to the Department of Justice
27 in Washington, D.C. (See Doc. 16-2.) A stamp indicates the filing was received by the
28 Clerk of the Supreme Court on October 31, 2014. (*Id.* at 2.) In the document, Petitioner

1 explains that his Rule 32 petition did not include prosecutorial misconduct as a basis for
2 relief. (*Id.*) He argues that his constitutional rights, as guaranteed by Amendments 4, 5, 6,
3 and 14 to the United States Constitution, were violated when “[t]he Pima County
4 Prosecutor knowingly submitted false evidence against the p[e]titioner and committed
5 p[e]rjury.” (*Id.* at 3.) In addition to his allegations of prosecutorial misconduct, Petitioner
6 asks the Department of Justice “to conduct an investigation” regarding the allegations so
7 that Petitioner can incorporate any findings into his Rule 32 petition. (*Id.* at 3-4.) The
8 Arizona Supreme Court issued an order dismissing this motion. (Doc. 16-1 at 2.) In the
9 order, the Supreme Court noted that Petitioner’s Rule 32 proceedings were still pending,
10 and the Court explained the proper procedure for seeking review in the Arizona Court of
11 Appeals and the Arizona Supreme Court of an adverse superior court ruling. (*Id.*)

12 **III. Applicable Law**

13 A writ of habeas corpus affords relief to persons in custody in violation of the
14 Constitution or laws or treaties of the United States. *See* 28 U.S.C. § 2254(a). If the
15 petitioner is in custody pursuant to the judgment of a state court, the writ will not be
16 granted with respect to any claim adjudicated on the merits in state court proceedings
17 unless prior adjudication of the claim –

- 18 (1) resulted in a decision that was contrary to, or involved an unreasonable
19 application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or
20 (2) resulted in a decision that was based on an unreasonable determination
of the facts in light of the evidence presented in the State court proceeding.

21 28 U.S.C. § 2254(d).

22 Federal habeas review is generally limited to those issues that have been fully
23 presented to the state court. This so-called “exhaustion rule” reads in pertinent part as
24 follows:

25 An application for a writ of habeas corpus on behalf of a person in custody
26 pursuant to the judgment of a State court shall not be granted unless it
appears that – (A) the applicant has exhausted the remedies available in
27 the courts of the State. . . .

28 28 U.S.C. § 2254(b)(1)(A).

1 To be properly exhausted, a claim must be “fairly presented” to the state courts in
2 a procedurally appropriate manner. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *see also*
3 *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). In other words, the state courts must
4 be apprised of the issue and given the first opportunity to rule on the merits. *Picard*, 404
5 U.S. at 275-76. Accordingly, the petitioner must “present the state courts with the same
6 claim he urges upon the federal courts.” *Id.* at 276. “The state courts have been given a
7 sufficient opportunity to hear an issue when the petitioner has presented the state court
8 with the issue’s factual and legal basis.” *Weaver v. Thompson*, 197 F.3d 359, 364 (9th
9 Cir. 1999).

10 In addition, the petitioner must explicitly alert the state court that he is raising a
11 federal constitutional claim. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Casey v.*
12 *Moore*, 386 F.3d 896, 910-11 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005). The
13 petitioner must make the federal basis of the claim explicit either by citing specific
14 provisions of federal law or federal case law, even if the federal basis of a claim is “self-
15 evident,” *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999), *cert. denied*, 528 U.S.
16 1087 (2000), or by citing state cases that explicitly analyze the same federal
17 constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

18 In cases not carrying a life sentence or the death penalty, “claims of Arizona state
19 prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals
20 has ruled on them.” *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (per
21 curiam), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been properly
22 exhausted, the petition may not be granted and ordinarily should be dismissed. *See*
23 *Johnson v. Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). In the alternative, the court has the
24 authority to deny on the merits rather than dismiss for failure to properly exhaust. 28
25 U.S.C. § 2254(b)(2).

26 A claim is “procedurally defaulted” if the state court was presented with the claim
27 but declined to address it on the merits for procedural reasons. *Franklin v. Johnson*, 290
28 F.3d 1223, 1230 (9th Cir. 2002). Procedural default also occurs if the claim was not

1 presented to the state court and it is clear the state court would now find the claim
2 procedurally barred. *Id.* at 1230-31.

3 Procedural default may be excused if the petitioner can “demonstrate cause for
4 the default and actual prejudice as a result of the alleged violation of federal law, or
5 demonstrate that failure to consider the claims will result in a fundamental miscarriage of
6 justice.” *Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998) (quoting *Coleman v.*
7 *Thompson*, 501 U.S. 722, 750 (1991)). “To qualify for the ‘fundamental miscarriage of
8 justice’ exception to the procedural default rule, however, [the petitioner] must show that
9 a constitutional violation has ‘probably resulted’ in the conviction when he was ‘actually
10 innocent’ of the offense.” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir. 2008) (quoting
11 *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

12 **IV. Discussion**

13 All four of the grounds for relief Petitioner presented in his Petition are
14 procedurally defaulted and Petitioner has not shown cause and prejudice or a miscarriage
15 of justice to excuse the procedural default. Accordingly, the § 2254 Petition will be
16 denied and this action will be dismissed with prejudice.

17 **A. Grounds One, Two, and Four**

18 Petitioner never raised any issues regarding the foundation for his indictment,
19 hearsay testimony at trial, or the state criminal court’s lack of jurisdiction in his appeal,
20 his Rule 32 petition, or in any other proceeding in state court. Thus, Petitioner did not
21 fairly present Grounds One, Two, and Four in state court. A return to state court to
22 exhaust the claims would be futile because the state court would now find the claims
23 procedurally barred. *See Ariz. R. Crim. P. 32.2*. Accordingly, the claims are procedurally
24 defaulted. Petitioner has not alleged any facts that would support a finding of cause and
25 prejudice or a miscarriage of justice to excuse the procedural default. These grounds will
26 be denied.

27 **B. Ground Three**

28 Although Petitioner raised the issue of prosecutorial misconduct in the October 31,

1 2014 filing with the Arizona Supreme Court (*see* Doc. 16-2), this was not a procedurally
2 appropriate means of presenting the claim to a state court, and the Arizona Supreme
3 Court dismissed it as such (Doc. 16-1). Put differently, the October 31, 2014 filing did
4 not give the Arizona Supreme Court, nor any other state court, the opportunity to address
5 the merits of Petitioner's prosecutorial misconduct claim. Prosecutorial misconduct was
6 not presented in Petitioner's appeal or in his Rule 32 petition. Thus, Ground Three was
7 not fairly presented in state court. A return to state court to exhaust the claim would be
8 futile because the state court would now find the claim procedurally barred. *See Ariz. R.*
9 *Crim. P. 32.2.* Accordingly, Ground Three is procedurally defaulted. Petitioner has not
10 alleged any facts to support a finding of cause and prejudice or a miscarriage of justice to
11 excuse the procedural default. This ground will be denied.

12 Accordingly,

13 **IT IS ORDERED** Petitioner's Petition under 28 U.S.C. § 2254 for a Writ of
14 Habeas Corpus (Doc. 1) is **denied**, and this action is **dismissed with prejudice**. The
15 Clerk of Court is directed to enter judgment accordingly and close this case.

16 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
17 Section 2254 Cases, the Court declines to issue a certificate of appealability, because
18 reasonable jurists would not find the Court's ruling debatable. *See Slack v. McDaniel*,
19 529 U.S. 473, 478, 484 (2000).

20 Dated this 20th day of March, 2018.

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Honorable Rosemary Márquez
United States District Judge